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IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

RICHARD W. REESE; GEORGE R. JORDAN; RICHARD D. KAUFMAN; BETTY SLATER; LARRY L. WYGLE; MARION R. CRAMBLIT; TIMOTHY WANNER, on behalf of themselves and the class that they represent,

Petitioners,

v.

CITY OF COLUMBUS; GREGORY S. LASHUTKA, MAYOR; LOCAL 1632, AFSCME; OHIO COUNCIL 8, AFSCME,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION

LARRY P. WEINBERG *
NEIL I. DITCHEK
1101 17th Street, N.W., #1210
Washington, D.C. 20036
(202) 775-5900

R. SEAN GRAYSON
AFSCME Council 8
6800 North High Street
Worthington, OH 43085-2512

DONALD J. MOONEY, JR.
BENESCH, FRIEDLANDER, COPLAN & ARONOFF
2800 Cincinnati Commerce Center
600 Vine Street
Cincinnati, Ohio 45202-2409

* Counsel of Record

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QUESTION PRESENTED

The City of Columbus, Ohio and Local 1632 of the American Federation of State, County and Municipal Employees have negotiated a standard union security agreement requiring all covered employees to contribute to the costs of union representation by paying agency fees. Local 1632 and other locals affiliated with AFSCME and its councils have pooled their resources, including funds collected pursuant to union security agreements, for the purpose of financing legal services involving contract enforcement, grievance handling and contract negotiations and publicizing AFSCME's position on the negotiation, ratification or implementation of affiliated locals' collective bargaining agreements.

The question presented here is whether the courts below abused their discretion in denying both summary judgment to the plaintiff fee payers on, and a preliminary injunction against, the use of agency fees paid by employees who object to financially supporting non-collective bargaining activities to create such a pool of collective bargaining resources.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
STATEMENT OF THE CASE	1
ARGUMENT	5
CONCLUSION	11

TABLE OF AUTHORITIES

Cases Page

Abood v. Detroit Board of Education, 431 U.S. 209 (1977) 5, 6, 7
Albro v. Indianapolis Educ. Ass'n, 585 N.E.2d 666 (Ind. Ct. App. 1992) 9
Browne v. Wisconsin Employment Relations Comm'n, 485 N.W.2d 376 (Wis. 1992) 9
Ellis v. Railway Clerks, 685 F.2d 1065 (9th Cir. 1982) 8
Ellis v. Railway Clerks, 466 U.S. 436 (1984) 8, 9, 10
Pilots Against Illegal Dues v. Air Line Pilots, 938 F.2d 1123 (10th Cir. 1991) 9
Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507 (1991) ..... *passim*

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BRIEF IN OPPOSITION

The opinions below, the basis for this Court's jurisdiction and the constitutional and statutory provisions involved are correctly set out in the petition for writ of *certiorari*. Pet. 1-2, 1a-70a.

STATEMENT OF THE CASE

Local 1632, American Federation of State, County and Municipal Employees ("AFSCME") is the exclusive bargaining representative for approximately 2,500 employees who work for the City of Columbus. Union representation is provided to these employees through a three tiered

structure: a local union that represents employees in a single bargaining unit (Local 1632); a state-wide union made up of such locals (Ohio Council 8); and a national union made up of such locals and councils (AFSCME). Accordingly, the dues and agency fees paid by the represented employees are divided among Local 1632, Ohio Council 8 and AFSCME.

All three tiers of the union provide services to represented employees working in its various bargaining units. Local 1632 is the formally recognized exclusive bargaining representative for the City of Columbus bargaining unit and provides employees in that unit with direct representation at their worksites. Ohio Council 8, which has approximately 240 affiliated local unions and 74 chapters, has a professional staff which performs most of the bargaining and contract enforcement for its affiliated local unions. AFSCME, which has approximately 70 councils and more than 3,000 affiliated local unions, provides specialized services to these councils and locals on an as-needed basis.

On March 25, 1992, the petitioners, who were employed by the City of Columbus and represented by Local 1632, initiated this action against the City of Columbus, its Mayor, Local 1632, and Ohio Council 8. The petitioners are not members of Local 1632, but by reason of a union security clause in their collective bargaining agreement pay agency fees to Local 1632 as a condition of employment. In their complaint, the fee payers alleged that the respondents violated their constitutional rights by failing to provide them with a proper notice prior to the collection of the agency fees. R. 1: Complaint.

On May 7, 1992, the District Court issued a preliminary injunction against the collection of agency fees from the petitioners. Pet. App. F. On October 6, 1992, Local 1632 filed a motion to dissolve the preliminary injunction based on a revised notice correcting the alleged deficiencies

and a recalculated fee. R. 45: Motion to Dissolve Preliminary Injunction. The petitioners raised new challenges to the revised notice, and on February 19, 1993, the District Court denied the motion to dissolve the preliminary injunction. Pet. App. E.

On January 15, 1993, the fee payers moved for summary judgment, seeking a ruling that the agency fees already collected violated the fee payers' constitutional rights. In an Opinion and Order entered on June 23, 1993, the District Court granted in part and denied in part the fee payers' motion for summary judgment. Pet. App. D. At the conclusion of its summary judgment opinion, the District Court stated that it would continue the preliminary injunction until such time as Local 1632 issued a notice to the fee payers meeting the requirements of that court's opinions. *Id.* at 40a.

On September 20, 1993, after Local 1632 had issued a revised notice and fee calculation to the fee payers and submitted copies to the court, the District Court granted the Union's motion to dissolve the preliminary injunction. R. 94: Entry Dissolving Injunction.

Then, on September 23, 1993, the parties reached a settlement disposing of all but three issues in this case. The partial settlement agreement, which was approved by the District Court, provided that any appeal would be limited to the propriety of the District Court's rulings with respect to whether the following categories of expenditures could be financed by pooling resources among affiliated local unions:

> 5. The public advertising of AFSCME's position on the negotiation, ratification, or implementation of collective bargaining agreements.
>
> 6. Lobbying for the negotiation, ratification, or implementation of a collective bargaining agreement.
>
> 15. The prosecution or defense of arbitration, litigation or charges to obtain ratification, interpretation,

> implementation, or enforcement of collective bargaining agreements or any other litigation before agencies or in the courts which concern bargaining unit employees which is normally conducted by an exclusive representative. [Pet. App. 23a.]

On October 4, 1993, the fee payers filed a Notice of Appeal from the dissolution of the preliminary injunction and on January 27, 1994, the fee payers filed a notice of appeal from the entry of judgment based on the partial settlement agreement.

On the consolidated appeals, the Sixth Circuit identified the issue before it as whether the District Court had committed an "abuse of discretion" or acted on an erroneous "legal premise" in "dissolving a preliminary injunction." Pet. App. 5a. In passing on this issue, the Court of Appeals also addressed the correctness of the District Court's denial of the petitioners' motion for summary judgment.

With respect to the first and third expenditure categories listed above—advertising the union's position on contract negotiation and enforcement and financing litigation directly related to the negotiation or enforcement of contracts—the Court of Appeals found that the District Court did not abuse its discretion or act on an erroneous legal premise in denying summary judgment, because "a disputed issue of material fact existed," or in dissolving the preliminary injunction, because "the objectors did not enjoy a substantial likelihood of success in their challenge of th[ese] charge[s]. . . ." Pet. App. 8a (collective bargaining litigation). *See also id.* at 9a-10a (holding the same with respect to collective bargaining advertising).

With respect to the third expenditure category—lobbying for the negotiation, ratification, or implementation of a collective bargaining agreement—the Court of Appeals reversed the District Court and remanded "for a determination of whether the lobbying expense charge benefitted the objectors' unit and if so, whether the expenditure is justified by the government's vital policy interest in labor

peace and avoiding free-riders and whether the charge significantly added to the burdening of free speech that is inherent in the allowance of an agency shop." Pet. App. 13a. And, as to this category of expenditure, the Court of Appeals reinstated the preliminary injunction. *Id.*

ARGUMENT

1. In substance the *certiorari* petition presents a single interlocutory legal issue:

> Did the courts below err in concluding that the petitioners, as agency fee payers, were not entitled to a summary judgment sustaining their claim that, as a matter of law, unions may not charge fee payers for the following categories of collective bargaining activities financed by pooling the resources from various represented bargaining units:
>
> - The public advertising of the union's position on the negotiation, ratification, or implementation of collective bargaining agreements.
> - The prosecution or defense of arbitration, litigation or charges to obtain ratification, interpretation, implementation, or enforcement of collective bargaining agreements or any other litigation before agencies or in the courts which concern bargaining unit employees which is normally conducted by an exclusive representative.

The decision below is correct in rejecting petitioners' challenge to the pooled multi-bargaining unit financing of these direct collective bargaining activities. The general principles governing the rights and obligations of agency fee payers stated by this Court in the line of cases from *Abood v. Detroit Board of Education,* 431 U.S. 209 (1977), to *Lehnert v. Ferris Facutly Ass'n,* 500 U.S. 507 (1991), applied to the specific union activities at issue here, dictate that result. And, while petitioners claim otherwise, there is nothing in the *Lehnert* opinions' treatment of litigation that makes the pooled financing of the legal activities in this case unlawful *per se*. At least

equally to the point, the decision below is the only federal court of appeals decision that addresses the chargeability to fee payers of these two categories of union activity as financed on a multi-bargaining-unit, pooled-resources basis. The "conflict" cases the petitioners cite deal with conceptually different issues. Particularly since the opinion of the court below is not cast as a final ruling on the merits of the petitioners' claims—but only as a ruling upholding the denial of summary judgment and the vacation of a preliminary injunction—this case in its present procedural posture does not raise any question warranting this Court's review.

2. As an overall matter it is lawful for a union to make use of agency fees from objecting fee payers "to finance expenditures by the Union for the purposes of collective bargaining, contract administration, and grievance adjustment. . . ." *Abood*, 431 U.S. at 225-226. And in *Lehnert*, this Court unanimously concluded that it is lawful to "utilize dissenters' fees for activities that, though closely related to collective bargaining generally, are not undertaken directly on behalf of the bargaining unit to which the objecting employees belong." 500 U.S. at 519.

In his *Lehnert* opinion, Justice Blackmun explained:

> [T]he unified-membership structure under which many unions, including those here, operate . . . is [premised on] the notion that the parent [organization] will bring to bear its often considerable economic, political, and informational resources when the [unit] is assessed for the bargaining unit's protection, even if it is not actually expended on the unit in any particular membership year. [*Id.* at 523.]

Justice Scalia made the same point in his separate opinion: "It is a tangible benefit . . . to have expert consulting services on call, even in the years when they are not used." *Id.* at 562.

On this basis, the *Lehnert* Court ruled that local "unions may bill dissenting employees for their share of

general collective-bargaining costs of the[ir] state or national parent union," because so long as "these costs [are found] to be germane to collective bargaining and similar support services . . . [n]o greater relationship is necessary" to make them chargeable to objecting fee payers. 500 U.S. at 527.

3. In this case, the petitioners challenge the legality of charging fee payers on a multi-bargaining unit basis for a program whereby Local 1632 joins with other AFSCME "locals [that] have pooled their resources at the council level in order to obtain legal services when needed" for "litigation . . . directly related to grievance handling, the enforcement of the collective bargining agreement and negotiating collective bargaining agreements." Pet. App. 7a (Court of Appeals), quoting *id.* at 37a (District Court). The District Court's opinion describes the litigation that is so financed in some detail:

> [O]ne-third of the cases litigated were arbitration cases and . . . over thirty-five of the court cases involved actions to enforce or vacate arbitration awards or to compel the employer to arbitrate. Another third of the cases involved proceedings before the State Employee Relations Board, 67% of which involved unfair labor practice charges in which the union asserted that the employer had failed to bargain in good faith. Another 18% of these cases involved the union's claim that the employer had discriminated against a bargaining unit member for engaging in union activities, and 6% of these cases involved situations in which Ohio Council 8 or a local union had been charged by an employer with failing to bargain in good faith. Pet. App. 46a.

It is plain—and the petitioners do not even deny—that these legal expenses are, as the lower courts recognized, *directly related to collective bargaining*. It is also plain—and the petitioners do not deny—that under *Abood* it is appropriate to charge objecting fee payers the costs of such legal services incurred for their own bargaining unit.

And, we submit that it is equally plain that where, as here, direct collective bargaining activity is at issue, the very point of *Lehnert* is to validate charges to fee payers for "that part of a local's [payments] which contributes to the pool of resources potentially available to the local . . . even if it is not expended on [the fee payers'] unit in any particular membership year." 500 U.S. at 523.

Indeed, petitioners do not even attempt a reasoned distinction of such legal activity directly related to collective bargaining from other direct collective bargaining activity. Rather, they argue that this Court's decision in *Ellis v. Railway Clerks*, 466 U.S. 435 (1984), requires single bargaining unit financing of legal activity and that *Lehnert* embraces this holding. Pet. 14-18. Petitioners dramatically overread *Ellis* and misread the multiple opinions in *Lehnert*.

What *Ellis* does is to accept the argument that a "single bargaining unit" limitation should apply with respect to the "*general* litigation. . . ," 466 U.S. at 441 (emphasis added), at issue in that case, which, as the lower court opinions there explain, "did not pertain to any specific collective bargaining agreement or grievance. . . ," *Ellis v. Railway Clerks*, 685 F.2d 1065, 1073 (9th Cir. 1982).

There is nothing in *Lehnert* that expands *Ellis*' ruling on such "general litigation"—which covers legal activity at some remove from the union's core collective bargaining functions—to govern the quite different situation presented by *direct* collective bargaining litigation.

Justice Kennedy's opinion is the *only Lehnert* opinion that directly addresses the issue of "litigation [that] is undertaken in the course of the union's duties as exclusive bargaining representative." 500 U.S. at 563. *See also id.* at 564. And, Justice Kennedy could "discern no additional burden on free speech from . . . . an arrangement" for financing such litigation on a resource-pooling basis. *Id.* Not surprisingly, Justice Scalia's opinion for himself and three other Justices—including Justice Kennedy—is

entirely consistent in its general approach with Justice Kennedy's particularized treatment of litigation. *See id.* at 561-562 (chargeable expenditures need not be broken down by bargaining unit).

Justice Marshall, in his turn, would have allowed all employment-related litigation—including of course, litigation directly related to collective bargaining, to be financed on a multi-unit basis. *Id.* at 544-549.

Justice Blackmun, writing for himself and three other Justices, did not treat with direct collective bargaining litigation in terms. Rather, his opinion reasons that, given "the important political and expressive nature of litigation" and the fact that "union litigation may cover a diverse range of areas from bankruptcy proceedings to employment discrimination," at least *some* employment-related litigation can be charged only on a unit-by-unit basis. 500 U.S. at 528. But, Justice Blackmun's line of reasoning and his reliance on *Ellis* in this portion of his opinion supports the understanding that he endorsed the unit by unit approach only for the sort of "general litigation" that was at issue in that earlier case.

In sum, both *Lehnert's* general principles and the treatment of litigation in the four *Lehnert* opinions show that the refusal of the courts below to grant the petitioners summary judgment or a preliminary injunction with regard to the legal activities here is correct.

4. The petitioners assert that three lower court decisions are in conflict with the decision below on the issue of direct collective bargaining litigation. *Pilots Against Illegal Dues v. Air Line Pilots,* 938 F.2d 1123 (10th Cir. 1991); *Browne v. Wisconsin Employment Relations Comm'n,* 169 Wisc.2d 79, 485 N.W.2d 376 (1992); *Albro v. Indianapolis Education Ass'n,* 585 N.E.2d 666 (Ind. Ct. App. 1992). However, none of these cases presented the distinction between the chargeability of "litigation [that] is undertaken in the course of the union's duties as exclusive bargaining representative," *Lehnert,* 500 U.S. at 563

(opinion of Kennedy, J.), and the chargeability of the "diverse range" of litigation that includes cases of an "important political and expressive nature," *id.* at 528 (opinion of Blackmun, J.), which fall under the rubric of "general litigation" as used in *Ellis,* 466 U.S. at 441. Precisely because the decision below turned on this important distinction and does treat separately with direct collective bargaining litigation, it presents no conflict with the lower court cases relied upon by the petitioners.

5. The courts below also refused to enjoin the use of the petitioners' fee payments to finance "public advertising of [the national union's] positions on the negotiation, ratification, or implementation of collective bargaining agreements," Pet. App. 9a (Court of Appeals), quoting *id.* at 37a (District Court), insofar as such "advertising expense appears to be related directly to the union's collective bargaining activities," Pet. App. 63a. The District Court based its ruling on its determination that "[a]dvertising of the union's positions on negotiation, ratification or implementation of collective bargaining agreements is germane to the success of the union's efforts in those areas and such expenses may ultimately inure to the benefit of the members of the local." *Id.*

Aside from a faulty analogy, the petitioners provide no support for their claim that while they may be charged for public statements regarding the union's position with respect to contract negotiations or enforcement within the petitioners' unit, their fee payments may not be used to create a pool of resources available for making such statements with regard to any unit contributing to the pool.

What the petitioners do argue is that the public statements regarding collective bargaining issues, which the courts below held could be financed on a multi-unit basis, should be equated to the "public speech in support of the teaching profession generally," addressed in *Lehnert* and found not chargeable at all. Pet. 23, quoting 500 U.S. at 528. Far from allowing the union to use objectors' pay-

ments to support such general public pronouncements, the district court specifically *forbade* the union to use the petitioners' payments for public statements regarding employment practices affecting unrepresented employees or "generally in support of public employee unionism. . . ." Pet. App. 38a. Precisely because of that ruling, the portion of *Lehnert* petitioners rely on is inapposite.

6. The petitioners' complaint with the Court of Appeals' ruling on lobbying goes to the formulation used by that court in its directions on remand. Pet. 26. Since the Court of Appeals' remand directions are taken almost verbatim from Justice Blackmun's *Lehnert* opinion, that complaint is without substance. Pet. App. 13a. Equally to the point, the *ruling* by the courts below on the lobbying issue is in the petitioners' *favor* to the extent of preliminarily enjoining the collection of fees from them to finance such activities.

CONCLUSION

The petition for a writ of *certiorari* should be denied.

Respectfully submitted,

LARRY P. WEINBERG *
NEIL I. DITCHEK
1101 17th Street, N.W., # 1210
Washington, D.C. 20036
(202) 775-5900

R. SEAN GRAYSON
AFSCME Council 8
6800 North High Street
Worthington, OH 43085-2512

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BENESCH, FRIEDLANDER,
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2800 Cincinnati Commerce Center
600 Vine Street
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* Counsel of Record